E-PAYMENTS AND AUSTRALIAN REGULATION

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I. INTRODUCTION

Electronic commerce has the potential to offer businesses a world wide market. Internet buying and selling to date largely involves the use of traditional payment methods, such as cheques, travellers cheques, postal orders or credit cards. These traditional methods seem likely to be replaced by electronic payments. Electronic payments are a paperless method of making payments. Their advantage is that they can be processed quickly and more cheaply than paper based payment instructions.[1] In addition, electronic payments offer a more convenient 'on-line' method of paying for Internet purchases.

Digital cash, smart cards, Internet banking funds transfers and secure Internet credit card payments are electronic payment methods potentially suitable for making Internet purchases.

This article outlines electronic payment developments and their regulation under Australian law. It examines in detail the regulatory requirements for operators of electronic payment schemes under the Financial Sector Reform legislation (known generally as 'the Wallis legislation'). The Wallis legislation aims, amongst other things, to maintain the integrity of the Australian payments system. This encompasses electronic payments and consequently the Wallis legislation impacts significantly on electronic payment scheme operators.

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1 See I Walden and N Savage, "The Legal Problems of Paperless Transactions" (1989) 3 *Journal of Business Law* 102.

II. ELECTRONIC PAYMENT METHODS

Examples of current electronic payment methods available to businesses are outlined below.

A. Digital Cash

Digital cash (DC) is an electronic method of payment on the Internet. A DC issuer will issue a 'digital coin' message 'signed' or encrypted with its private key (a secret key known only by the issuer). That message will contain the identity of the issuer, its Internet address, the amount of the coin, its serial number and an expiry date (if applicable). In addition, the issuer maintains records to ensure the coin is not double spent. The customer wishing to receive the digital coin sends a request to the issuer. That request is encoded with the customer's private key. The issuer then decodes the message with the customer's public key, which is available in a public key directory, and thus the issuer can authenticate the request.

The coins are issued to a particular customer by encoding the coin with the customer's public key. The customer can read the coin only by decoding it with their private key, hence only a customer to whom the coins are issued can read the message. The customer then stores the coins on their computer system.

When a purchase is being made, the customer sends a digital coin message to a merchant, encrypted with the merchant's public key to prevent interception. The merchant decodes the message with their private key and verifies the payment message by using the issuer's public key to confirm that it is a 'coin' for the appropriate amount of the payment. Furthermore, the merchant asks the issuer to verify that the serial number of the coin is still current and has not already been spent.[2]

The issuer credits the merchant's account with currency and then cancels the serial number so that the coin cannot be spent again. St George Bank is Australia's first bank to issue digital coins.[3]

B. Digital Cheques

Similar techniques can be used to send electronic cheques and bills of exchange across the Internet. The Internet cheque message contains the same information as would appear on a paper cheque and is digitally signed. That is, it is encoded by encrypting the message with the drawer's private key. It is then sent to the payee. When the payee's bank collects the cheque for the payee this is marked on the cheque message and that message is encoded with the drawer's bank's private key, which provides proof of payment.

C. Stored Value Smart Cards

A smart card is a plastic card which contains a micro-processor chip which can store more information than existing magnetic stripe cards. It can also perform

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2 This is also known as multiple spending, respending, double spending and repeat spending. DC issuers usually maintain a database of spent coin serial numbers in order to ensure that a coin is only spent once.

3 See <www.stgeorge.com.au/ecash/>.

simple computing operations. The smart card is generally inserted into a terminal where the card comes into contact with a read/write mechanism which allows information to be passed to and from the card and the terminal.

Smart cards have many potential uses including payments, financial services, encryption and storing health records. Each different application may give rise to a number of legal and social issues (for example laws regulating the provision of health services and collection of health information would apply to a 'health record' smart card). This article focuses on stored value smart cards.

A stored value smart card (SVC) is an electronic payment method where a consumer pays up front for value which is then stored on a renewable or disposable smart card and spent later when buying goods and services. The value on the card is decremented as it is used, until there is no residual value left on the card at which point it is then either recharged or thrown away.[4]

A customer may load value onto an SVC at the issuing institution, at an automated teller machine (ATM), at a terminal held by a retailer or merchant, or through a home banking terminal, business or personal telephone. SVCs could be used to make Internet purchases by linking an SVC reader to a computer.

Telstra's Phonecard Smartcard is an example of an SVC currently used in Australia. SVCs are also offered or being trialed by Quicklink, Mondex, Visa and Mastercard.

SVCs can have different features. Possible variations in the features include:

- personalised or anonymous;
- disposable or rechargeable;
- secured by PIN numbers or unsecured;
- accounted (transaction details are transmitted to a system operator but not necessarily to the consumer and those details may include the identity of the cardholder) or non-accounted;
- single currency or multicurrency;
- single function or multifunctional (for example an SVC function combined with debit and credit card or loyalty scheme functions).

D. Internet Banking

There are hundreds of banks in the United States and a growing number of banks in Australia which offer Internet banking in some form.[5]

Several cyberbanks (branchless banks offering their customers remote account access only) have been established overseas. Examples include First Direct[6] in the United Kingdom and Security First Network Bank[7] in the United States.

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4 A renewable smart card may have its funds replenished when there is no residual value left or at some earlier point in time.

5 At time of writing, the following banks offered Internet banking: St George, <www.stgeorge.com.au/intbank>; Commonwealth Bank of Australia, <www.commbank.com.au/Netbank>; Westpac, <www.westpac.com.au>; ANZ, <www.anz.com/pcbank>; Adelaide Bank, <www.adelaidebank.com.au/home/online/>.

6 <www.firstdirect.co.uk>.

7 <www.sfnb.com>.

In the United States most of the major banks also offer on-line banking facilities. Until recently the stronger encryption technology used by US banks was banned from export outside the United States. The restriction was lifted and Australian Financial Institutions[8] are now able to use similar security techniques to those used by US financiers, including using encryption security to offer secure on-line banking from common web browsers.[9] All the banks offer the ability to transfer funds between accounts and view a record of past transactions.

In the future, personal computers or telephones with smart card readers will eventually permit the transfer of value from an account onto an SVC, using the Internet or telephone lines. This means that personal computers or telephones may potentially provide 'personal ATM services' for consumers.

E. Electronic Payment Services

Many financiers are offering their customers the ability to pay their bills electronically by instructing their financier to debit an account that the customer holds with that financier, and pay an amount to a third party using a telephone or the Internet. One such service is the BPAY scheme.

Since November 1997, customers of financial institutions participating in the BPAY scheme can pay amounts to participants in the BPAY Scheme, using a telephone or in some cases, Internet banking facilities. The BPAY Scheme is an electronic payments system, allowing customers (individuals and businesses) to instruct their financial institution to pay amounts to nominated people or institutions (namely billers). BPAY's advantage is that it allows a payer to pay bills of varying amounts to participating billers at any time.

F. Credit Card Payments

Credit cards are a popular payment method for electronic commerce purchases. Previous methods of using credit cards for Internet purchases involved sending card details by fax or email to the Internet merchant. This practice raised fears of credit card fraud, including credit card details being intercepted over the Internet by unauthorised parties and the non 'face-to-face' nature of Internet transactions making it difficult to validate on-line the authenticity of customers and merchants.

Concerns about credit card fraud led to the development of techniques to safeguard the viability of using credit cards as an Internet payment method. This includes technologies allowing credit card details to be encrypted and securely transferred to an automatic processing system. The inclusion of secure socket layers (SSL) in the latest web browsers enhances this capability. SSL allows the encryption of credit card numbers and provides protection from tampering. Without the aid of additional applications, however, it does not provide

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8 See for example <www.westpac.com.au>.

9 Financiers may also use a system whereby a customer must first download and install a special piece of software on their computer. To transact the customer launches the proprietary software which then communicates with the bank's central computer over the Internet, using encryption. This is distinct from the 'web based' banking in which a common web browser (Netscape or Internet Explorer) is used instead of a specific program.

authentication of users.[10]

(i) Secure Electronic Transaction Protocol

Authentication is expected to be provided by the Secure Electronic Transaction (SET) protocol, which is being promoted by the major card association companies.[11] The SET protocol is a software standard developed to ensure buying and selling over the Internet is conducted within a confidential framework. Such software employs encryption techniques to provide confidentiality of information, ensure the integrity of payments and authenticate the identity of both merchants and cardholders when purchases of goods and services are made. SET will allow transactions over the Internet without disclosing any merchant or cardholder details. American Express, Mastercard and Visa have agreed to form SETCo,[12] a cooperative effort conducting compliance testing with the long term aim of having SET adopted as the global standard.

(ii) Telstra SureLink

SureLink is a service provided by Telstra that aims to remove the safety and security risks involved when a customer sends their credit details over the Internet. It links consumers with business and allows the buying and selling of goods and services electronically using a variety of payment options.

The process involves a customer preregistering their card details and then entering into a contract with SureLink. Merchants also register with SureLink. When a customer buys from a merchant that is registered with SureLink, the customer indicates that they wish to use a certain card which is done by sending an encrypted message. The merchant informs SureLink that the customer wishes to use that credit card. SureLink then obtains an authorisation from the card issuing bank for that transaction. Finally, SureLink effects the financial switch and confirms to the merchant and customer that the sale has been accepted.[13]

III. STRUCTURING E-PAYMENTS UNDER AUSTRALIAN LAW[14]

A. A Legal Minefield?

It is common to read that there is no 'law' governing electronic commerce. This is true only in the very restricted sense that there is currently very little law directed specifically at electronic schemes. However, it is obvious that the general law will apply to electronic commerce just as it does to other forms of commerce.

The absence of specialised law has an important consequence: careless

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10 For a general description of SSL, see <www.ics.lu.se/staff/icspw/INF344_DK/snapshot/vt97/3B/ssl.htm>; or for a general descrition of SSL, see <www.columbusmedia.com/ColumbusN/ssl.htm>.

11 This includes Mastercard and Visa, with American Express and JCB likely to follow soon.

12 See <www.setco.org>.

13 See <www.surelink.com.au>.

14 The authors gratefully acknowledge the contribution of Dr Alan Tyree to this section of the article.

implementation of an electronic commerce scheme may result in the application of unexpected law. Unexpected agency relationships may be lurking in the structure. Obscure legislative provisions may require compliance or prohibit certain activities.

The problem is particularly important when planning electronic payment schemes. These schemes typically have a large number of participants. If the scheme is not carefully structured, the relationships between the participants and the allocation of risks may be unpredictable. Subsequent changes in the structure of the scheme are likely to be expensive and disruptive.

We discuss here some of the more important legal issues to consider when structuring electronic payment schemes, such as SVC or DC schemes.

B. Scheme Participants

The main participants in a SVC or DC scheme will be the card or coin issuer, the participating merchants and the card or coin users. In an SVC scheme, there will also be a technology supplier (who may also be the scheme operator) who provides the physical cards and terminals for the operation of the scheme. There may also be a scheme operators, (in addition to the SVC or DC issuer) who oversees the scheme.

An SVC or DC issuer may be a financial institution. If an SVC issuer is not a financial institution, then it will need some arrangement with one or more financial institutions if the card is 'rechargeable' through a deposit account, but not if the card is 'disposable' or if it may be recharged by specific payment.

If an SVC or DC scheme is to be successful, there must be a relatively large number of merchants and a large number of SVC or DC holders or users. It is desirable that all members of each of these classes be treated equally. The usual way of achieving this is with master agreements that are binding on each member of the class.

The merchant agreement will define the obligations and rights of the merchants participating in the scheme. This agreement will be concerned mainly with the commercial aspects of scheme participation. Terms and conditions will define the rights and obligations of the SVC or DC holder. These must clearly mesh with the merchant agreement in those areas, such as the right to refunds, which affect both merchants and SVC or DC holders.

Apart from defining the rights and obligations of the parties, the scheme structure must consider existing and likely regulation.

C. Like Cash?

SVCs and DC are often likened to cash. However, they lack many of the characteristics of cash. Some of the differences are important to consider when structuring the system:

- SVCs and DC are not legal tender, so that no merchant is obliged to accept the tender of an SVC or DC as payment for goods or services;
- SVCs are not negotiable. The loss of the card is the loss of a chattel, not the loss of cash;

- acceptance of an SVC or DC for 'payment' does not necessarily unconditionally discharge a debt;
- spare amounts of cash may be combined with other cash. Whether the 'residue' on an SVC or DC may be so combined depends on the applicable scheme rules;
- generally speaking, cash does not have an expiry date. Some SVC and DC schemes may specify an expiry date for cards and coins as a security precaution.

These differences may be ameliorated by the contractual structure of the scheme. Thus, for example, the terms and conditions could define the SVC or DC holder's responsibility for lost cards, or in the case of DC 'lost coins', due to system malfunction. Terms and conditions can also regulate the rights of the SVC or DC holder to claim refunds for residual value on SVCs or unspent DC.

The merchant agreement must oblige the merchant to accept tendered SVCs or valid DC as payment and the scheme rules should make it clear whether the acceptance of the SVC or DC is a conditional or unconditional payment.

D. Regulatory Issues

The scheme must be structured in a way that conforms with existing regulatory requirements and does not breach statutory prohibitions. Some of the most important regulations to consider include the *Reserve Bank Act* 1959 (Cth), which, by s 44, prohibits the issue of bills or notes for the payment of money payable to bearer on demand and intended for circulation. Further, s 22 of the *Currency Act* 1965 (Cth) prohibits the issuing of any item as a "token for money or as purporting that the holder is entitled to demand any value denoted on it."

State and Commonwealth legislation regulates "unclaimed monies". This raises the question whether the unused portion of SVCs or unspent DC can be classified as "unclaimed monies".[15]

A further question is whether the SVC or DC issuer is a "cash dealer" for the purposes of ss 1, 7, 8A and 18 of the *Financial Transaction Reports Act* 1988 (Cth) (FTRA). If an e-payment service constitutes an "account", it may be necessary to comply with the FTRA requirements for opening an "account". That then raises the question for s 20: who are the "signatories" to the account?

Another piece of potentially important legislation is the *Proceeds of Crime Act* 1987 (Cth) which imposes an obligation on financial institutions to retain certain transaction records. It is unclear to what extent these requirements impact upon an SVC or DC scheme.

This above list is by no means exhaustive. It goes without saying that SVC or DC schemes must be structured to conform with the requirements of the *Trade Practices Act* 1974 (Cth) and the laws relating to intellectual property. In addition, electronic payment schemes must comply with Australian payments system regulation. The implications of that regulation, especially the *Banking Act* 1959

15 See for example *Unclaimed Money Act* 1995 (NSW), *Unclaimed Moneys Act* 1962 (Vic), *Public Trustee Act* 1978 (Qld), *Unclaimed Money Act* 1990 (WA), *Banking Act* 1959 (Cth) and the *Corporations Law*.

(Cth) (the *Banking Act*) and the *Payment Systems (Regulation) Act* 1998 (Cth) are discussed in detail below.

IV. WALLIS LEGISLATION

A. Development of the Wallis Legislation

The Australian Financial Systems Inquiry, released on 9 April 1997 (known as the 'Wallis report') made wide ranging recommendations for reform of the whole Australian financial sector. Some of those recommendations concern electronic commerce.[16]

The Australian Federal Government developed a package of legislation implementing many of the Wallis recommendations. The package (known as the 'Wallis legislation') commenced operation on 1 July 1998.[17]

In his second reading speech, the Treasurer stated that the Wallis legislation:

> puts in place a structure designed to improve the efficiency and competitiveness of the Australian financial system while preserving its integrity, security and fairness.[18]

The focus of this article is on those parts of the Wallis legislation which potentially impact electronic payment schemes.

B. The Regulators

The Wallis legislation establishes three key organisations involved in the supervision and regulation of the Australian financial sector.

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16 Financial Systems Inquiry (Mr Stan Wallis, chairman), *Final Report*, AGPS, 1997. Available at: <http://www.treasury.gov.au/Publications/FSI/>.
Recommendation 72: Stores of value for payment instruments should be subject to regulation
Recommendation 75: Non-deposit takers should be able to settle directly consumer electronic and bulk electronic payments
Recommendation 91: Legislation should be amended to allow for electronic commerce
Recommendation 92: Australia should adopt international standards for electronic commerce
Recommendation 93: International harmonisation of law enforcement and consumer protection should be pursued
Recommendation 94: Regulators should coordinate on technology

17 The package introduced the following pieces of legislation:
Australian Prudential Regulation Authority Act 1998 (Cth);
Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 (Cth);
Financial Sector Reform (Consequential Amendments) Act 1998 (Cth);
Payment Systems (Regulation) Act 1998;
Financial Sector (Shareholdings) Act 1998;
Authorised Deposit-taking Institutions Supervisory Levy Imposition Act 1998 (Cth);
Authorised Non-Operating Holding Companies Supervisory Levy Imposition Act 1998 (Cth);
Superannuation Supervisory Levy Imposition Act 1998 (Cth);
Retirement Savings Account Providers Supervisory Levy Imposition Act 1998 (Cth);
Life Insurance Supervisory Levy Imposition Act 1998 (Cth);
General Insurance Supervisory Levy Imposition Act 1998 (Cth);
Financial Institutions Supervisory Levies Collection Act 1998 (Cth);

18 Australia, House of Representatives 1998, Debates, 26 March 1998, p 1649.

(i) The Reserve Bank of Australia

The Reserve Bank of Australia (RBA) will be responsible for monetary policy, financial system stability and the regulation of the Australian payments system (the regulation of the payments system will be conducted through the new Payments System Board – see below).

(ii) The Australian Prudential Regulation Authority

The newly formed Australian Prudential Regulation Authority (APRA) will provide prudential regulation for deposit-taking institutions, life and general insurance companies and superannuation funds. APRA will replace all the current institutionally based agencies involved in prudential supervision. Under the former structure the RBA supervised banks, while the State based financial institutions scheme (incorporating the Australian Financial Institutions Commission and State supervisory authorities) covered building societies, credit unions and friendly societies; and the Insurance and Superannuation Commission regulated life and general insurance companies and superannuation funds.

(iii) The Australian Securities and Investments Commission

The Australian Securities and Investments Commission will provide regulation for the integrity of market conduct, consumer protection and corporations generally. It is based on the former Australian Securities Commission.

C. Impact of Wallis Legislation on Electronic Payments

The Wallis legislation has significant implications for electronic payments. The key implications are summarised below.

The holders of the stored value for electronic payment schemes are regulated, that is, issuers must be Authorised Deposit taking Institutions (ADIs) or be otherwise regulated. Prior to the Wallis legislation, non-financial institutions holding such stores of value were not subject to Australia's payment system regulatory regime.

The operation of payment systems (including electronic payments) are regulated. Operators of payment systems may be subject to access regimes and may have standards imposed on them.

Prudential regulation is now based on whether an institution takes deposits. Prior to the Wallis legislation, regulation of the Australian financial system focussed on the status of an institution in order to determine how and by whom it was regulated.[19] This raises issues for electronic payment schemes as to whether they involve the taking of 'deposits' and are consequently subject to prudential regulation under the Wallis legislation.

The following diagram summarises the impact of the Wallis legislation on electronic payments. The remainder of this article discusses that impact.

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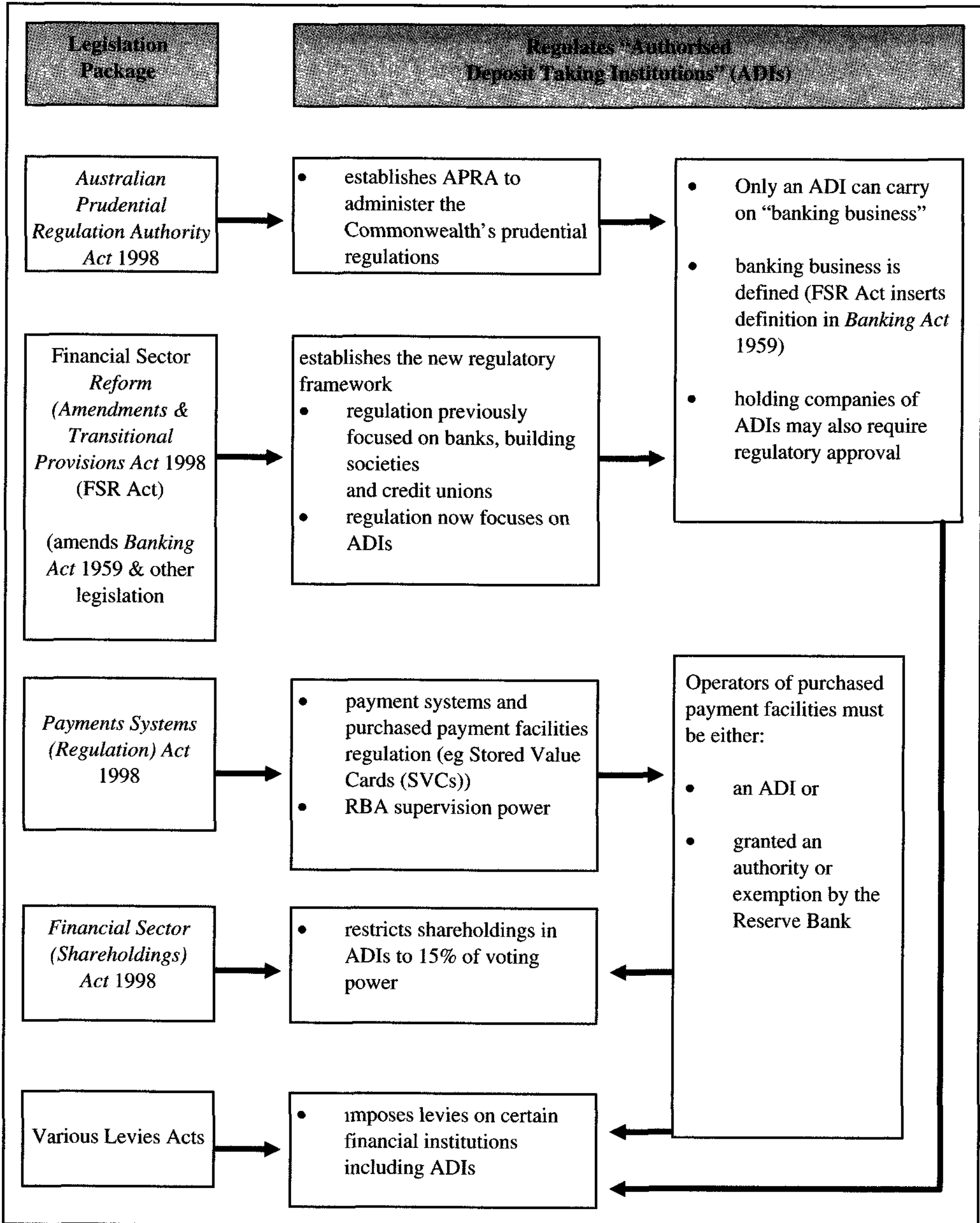
19 See discussion in section VII below.


Legislation Package
Regulates "Authorised Deposit Taking Institutions" (ADIs)
Australian Prudential Regulation Authority Act 1998
• establishes APRA to administer the Commonwealth's prudential regulations
• Only an ADI can carry on "banking business"
• banking business is defined (FSR Act inserts definition in Banking Act 1959)
• holding companies of ADIs may also require regulatory approval
Financial Sector Reform (Amendments & Transitional Provisions Act 1998 (FSR Act)
(amends Banking Act 1959 & other legislation
establishes the new regulatory framework
• regulation previously focused on banks, building societies and credit unions
• regulation now focuses on ADIs
Payments Systems (Regulation) Act 1998
• payment systems and purchased payment facilities regulation (eg Stored Value Cards (SVCs))
• RBA supervision power
Operators of purchased payment facilities must be either:
• an ADI or
• granted an authority or exemption by the Reserve Bank
Financial Sector (Shareholdings) Act 1998
• restricts shareholdings in ADIs to 15% of voting power
Various Levies Acts
• imposes levies on certain financial institutions including ADIs

D. Payment System Board Regulation

As noted earlier, the Wallis legislation establishes a Payments System Board (PSB)[20] within the RBA. The PSB has responsibility for overseeing and implementing RBA policies to improve payments systems efficiency, including the adoption of the most efficient technology platforms and enhancing competition in the market for payment services, consistent with overall systemic stability. The legislation gives additional powers to the RBA to regulate *payment systems* and *purchased payment facilities*.

The powers of the RBA include the regulation of electronic payment systems, such as digital cash and SVCs. This is provided by one of the pieces of legislation comprising the package, namely the *Payments System (Regulation) Act* 1998 (hereafter *PS Act*). In his Second Reading speech, the Treasurer indicated that the *PS Act* was to apply to "stored value cards, travellers cheques and Internet cash facilities".[21]

The regulatory regimes imposed on *payment systems* and *purchased payment facilities* are not inconsistent. Regulation of *payment systems* deals with issues such as access, dispute resolution, and the commercial terms of this system.[22] On the other hand the regulation of *purchased payment facilities* focuses on prudential supervision and regulation of the holders of the store of value of such facilities.[23]

It is therefore possible that the operator of an electronic payments scheme could be subject to regulation as the holder of the store of value for the scheme (as it is a *purchased payment facility*), while at the same time the scheme itself could be subject to regulation by the RBA as a *payment system*.

The Wallis legislation's regulation of *payment systems* is discussed in Part V below and the regulation of *purchased payment facilities* is discussed in Part VI.

The RBA has the power to require "a participant in a payment system" to provide the RBA information regarding the operation of the payment system or its participants.[24] An analogous power exists in respect of purchased payment facilities.[25] These powers may be exercised over any payment system or facility, whether or not the system has been designated for further regulation (see below). Extensive penalties exist for breaches of these information gathering requirements.[26]

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20 *Reserve Bank Act* 1959 (Cth), s 10A, inserted by Schedule 14, Item 20 of the *Financial Sector Reform (Amendments and Transitional Provisions) Act* 1998 (Cth).

21 Note 18 *supra*, p 1657.

22 See Part 3 of the *PS Act*.

23 *Ibid*, Part 4.

24 *Ibid*, s 26(1).

25 *Ibid*, s 26(2).

26 For example, a corporation fails to comply with a request for information would be liable for a fine up to 1 000 penalty units (approximately $110 000) per day that the breach continues.

V. PAYMENT SYSTEMS

The *PS Act* applies to payment systems as well as purchased payment facilities. A *payment system* is defined in the *PS Act* as a:

> funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system.[27]

The definition is broad and given the Treasurer's statements (see section IV A above), would cover most electronic payment systems.

This *PS Act* provides that in order for a particular payment system to be covered by the *PS Act* the RBA must designate the system by publishing a notice in the Gazette.[28] Section 30 of the *PS Act* allows the RBA to publish a notice of any matter required to be notified in the gazette in "any other way it considers appropriate".[29] A public interest test must be met before the RBA can make such a designation.[30] The concept of the *public interest* is expanded upon in s 8, which states that the RBA must:

> have regard to the desirability of payment systems
>
> (a) being (in its opinion)
>
> (i) financially safe for use by participants; and
>
> (ii) efficient; and
>
> (iii) competitive; and
>
> (b) not (in its opinion) materially causing or contributing to increased risk in the financial system."

The RBA has the power to revoke a prior designation (again, by publishing a notice in the Gazette).[31] In addition, the RBA is able to impose access regimes upon a designated payment system. The *PS Act* provides:

> *access*, in relation to a payment system, means the entitlement or eligibility of a person to become a participant in the system, as a user of the system, on a commercial basis on terms that are fair and reasonable.[32]

Any *access* regime imposed must be one the RBA considers appropriate, having regard to matters including the public interest, the interests of current participants in the scheme and the interests of any possible future participants.[33] The Explanatory Memorandum to the *PS Act* mentions institutional schemes such as those established by the Australian Payments Clearing Association as one area where access may need to be addressed.[34] The likely beneficiaries of any access

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27 *PS Act*, s 7.

28 *Ibid*, s 11.

29 This appears to be in addition to the requirement to publish the Gazette notice.

30 *PS Act*, s 11.

31 *Ibid*.

32 *Ibid*, s 7.

33 *Ibid*, ss 8, 11 and 12. Section 28 imposes various consultation obligations upon the RBA when considering an access regime.

34 *Explanatory Memorandum*, Payment Systems (Regulation) Bill 1998 at [3.4]. The Explanatory Memorandum is available at: <http://www/aph.gov.au/hansard/index.htm>.

regimes would be new entrants to the finance sector, such as utilities or retail organisations.[35] There is no indication whether the RBA is likely to use its access regime powers to regulate access by a particular group to a payment system.

The RBA has the power to vary an access regime and to undertake enforcement action.[36] Its enforcement power includes the power to direct a participant in a payment system to undertake or refrain from certain specified conduct.[37]

The RBA is able to determine *standards* to which designated payment systems must adhere.[38] When considering whether to impose standards, the RBA must consider the public interest (see the discussion of "public interest" above). Section 28 of the *PS Act* also imposes various consultation obligations upon the RBA when considering the imposition of standards. The *PS Act* does not define *standards* nor does it provide any guidance as to what a standard may require or contain. The issue is not addressed by the Explanatory Memorandum to the *PS Act*. This concept of payment system standards may have particular importance in the future. This power arguably could be used by the RBA, for example, to impose interoperability or authentication standards on a dominant electronic payment system if it was in the public interest to do so, as the technology and frameworks of electronic commerce develop.

The RBA also has the power to vary or revoke a standard.[39] Its enforcement power includes the power to direct a participant in a payment system to undertake or refrain from specified action and it is an offence to fail to comply with such a direction.[40]

Furthermore the RBA may arbitrate disputes arising from a payment system.[41] This power can only be exercised where the dispute raises issues relating to the financial safety of the payments system, the efficiency or competitiveness of a payment system or a risk to the financial system. The RBA can only arbitrate a dispute with the consent of the parties to the dispute.

At the time of writing, there is no indication that any existing or proposed electronic payment systems are likely to be designated by the RBA. In this context, the Explanatory Memorandum to the *PS Act* focuses on discussing access to Australian payment clearing systems. If an electronic payment system becomes a dominant payment system and access is restricted in some significant way, it is possible in the future that the RBA could use its powers under the *PS Act* to regulate such a system, if it is in the public interest to do so.

VI. REGULATION OF PURCHASED PAYMENT FACILITIES

The *PS Act* also establishes a regulatory framework for *purchased payment*

35 *Ibid* at 3.20 and 3.21.
36 *PS Act*, ss 14 and 16.
37 *Ibid*, s 21.
38 *Ibid*, s 18.
39 *Ibid*, s 18.
40 *Ibid*, s 21.
41 *Ibid*, s 20.

facilities, other than cash.[42] An electronic payment system will be a purchased payment facility if:

(a) the facility is purchased by a person from another person

(b) the facility is able to be used as a means of making payments up to the amount that, from time to time, is available for use under the conditions applying to the facility; and

(c) those payments are made by the provider of facility or by a person acting under an arrangement with the provider of the facility (other than the user of the facility).[43]

The *PS Act* regulates the holder of the stored value of a purchased payment facility. The holder of the stored value is defined as the person who makes the payments described in (c) above.[44] Holders are regulated under the Act "to provide security for the store of value in the interests of protecting consumers and to promote public confidence in these systems while increasing the level of competition and efficiency".[45]

The effect of the *PS Act*[46] is that a corporation[47] is not permitted to be the holder of the stored value of a purchased payment facility unless:

- the corporation is an ADI;[48] or
- the corporation is authorised by the RBA;[49] or
- the corporation is exempted by the RBA;[50] or
- the purchased payment facility itself is declared by the RBA to be exempt from the *PS Act's* application.[51]

Criminal sanctions apply to the corporation if these conditions are not met. Promoters of electronic payment schemes that are purchased payment facilities will need to give careful consideration to the manner in which they will comply with the *PS Act*.

(i) ADIs

Electronic payment scheme operators must consider whether their scheme will require or enable them to be registered as an ADI. The circumstances in which a scheme operator will need to be registered as an ADI, and the regulatory requirements imposed on ADIs, are discussed in detail in section VII below.

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42 *Ibid*, s 9(1).

43 *Ibid*, s 9.

44 *Ibid*, s 9(2).

45 Note 34 *supra* at [5.34-5].

46 *PS Act*, s 22.

47 The *PS Act* specifically refers to the concept of a constitutional corporation, that is an entity that is a corporation for the purposes of the corporations power under s 51(xx) of the Constitution (the power to legislate in respect of trading and financial corporations).

48 As defined in the *Banking Act* 1959 (Cth) as recently amended (see discussion in section VII below). Effectively the institution must be under the supervision of APRA.

49 *PS Act*, s 23.

50 *Ibid*, s 25.

51 *Ibid*, s 9(3).

(ii) Authority

A corporation may apply to the RBA for an authority under s 23 of the *PS Act* to be the holder of the stored value of a purchased payment facility. The *PS Act* states that:

> [t]he Reserve Bank may grant the authority if it is satisfied that the corporation will be able to satisfy its obligations as the holder of the stored value of purchased payment facilities of the relevant class.[52]

An authority under s 23 may be subject to conditions "aimed at ensuring the corporation meets its obligations as holder of the stored value of purchased payment facilities of the relevant class".[53] The RBA may revoke an authority upon its own initiative or following a request from the corporation holding the authority.[54] Under s 24, the RBA may give a direction to the holder of an authority requiring that they comply with a condition of the authority. Failure to comply with such a direction is an offence under the *PS Act.*[55]

(iii) Exemption – Specified Corporation

An exemption may be granted to a specific corporation or a class of corporations which allows them to be the holder of the stored value in respect of a specified class of purchased payment facilities.[56] The RBA may grant such an exemption on its own initiative[57] or pursuant to an application made under s 27[58] and may also revoke an exemption.[59] Before granting an exemption, the RBA must be:

> satisfied that the corporation, or each of the corporations in the class, will be able to satisfy the obligations of the holder of the stored value of purchased payment facilities of the relevant class.[60]

An exemption may be revoked by the RBA.[61]

While an exemption and an authority appear similar, there are three important distinctions between them:

- an *authority* can only be granted in respect of a specified corporation, whereas an *exemption* may cover a class of corporations;
- an *authority* may be subject to conditions; and
- an *exemption* may be granted upon the RBA's own initiative, whereas an *authority* can only be granted in response to a specific application.

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52 *Ibid*, s 23(2).
53 *Ibid*, s 23(4).
54 *Ibid*, s 23(6).
55 *Ibid*, s 24(5).
56 *Ibid*, s 25.
57 *Ibid*, s 25(2).
58 The RBA may determine requirements regarding applications, such as the means by which an application may be made, the information to be included and the verification of the application or information associated with it.
59 *PS Act*, s 25(3).
60 *Ibid*, s 25(3).
61 *Ibid*, s 25(6).

(iv) Exemption – Specified Purchased Payment Facility

Under s 9(3), the RBA may also exempt a specified *purchased payment facility* or class of facilities from the *PS Act*. This is a declaration that the *PS Act* does not apply to the scheme. This has a similar result to an exemption granted under s 25 but it applies to the facility itself, not a particular corporation. If a particular facility is declared exempt, any corporation, regardless of its identity or nature, may be the holder of stored value of such a facility without contravening the *PS Act*.

Prior to granting an exemption under s 9(3), the RBA must consider:

> that it is not appropriate for [the *PS Act*] to apply to the facility ... having regard to:
>
> (a) any restrictions that limit the number or types of people who may purchase the facility; or
>
> (b) any restrictions that limit the number or types of people to whom payments may be made using the facility."[62]

The Explanatory Memorandum to the *PS Act* states that "smart cards operating in closed systems for the purposes of a single merchant or small group of merchants (such as telephone cards) pose little systemic risk and require no special prudential regulation".[63] The RBA is consequentially likely to declare that the *PS Act* will not apply to a closed system of that type.

B. Transitional Arrangements

Under the transitional arrangements in the *Financial Section Reform (Amendments and Transitional Provisions) Act* 1998 (Cth) *(FSR Act)*, a corporation which holds the stored value at the time of commencement of the *PS Act* will be deemed to have an authority granted by the RBA.[64] However the RBA can impose conditions on the authority which can be similar in nature to the prudential regulation imposed on ADIs.

VII. AUTHORISED DEPOSIT-TAKING INSTITUTIONS

Financial sector regulation prior to the Wallis legislation was based on, and

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62 *Ibid*, s 9(3).

63 Note 34 *supra* at [3.8].

64 *PS Act*, Schedule 19, Part 5, Clause 44.

varied according to, the character or status of the particular institution.[65] The Wallis legislation regulates the financial sector on the basis of function, rather than status. From 1 July 1998, the Wallis legislation imposes a regulatory regime on ADIs. Thus a bank will no longer be treated differently just because it is a bank, as opposed to a building society or credit union. This has wide reaching implications for electronic commerce as electronic payment issuers, regardless of whether or not they are a conventional financial institution, may fall within the ambit of regulation aimed at the financial sector.

A. Definition of an ADI

As stated above the Wallis legislation creates a new class of financial institution, the ADI. An ADI is defined as:

> a body corporate in relation to which an authority under subsection 9(3) [to carry on banking business] is in force.[66]

That is, an ADI is a body corporate with an authority, granted by APRA,[67] to conduct banking business. An ADI may be a bank, credit union or building society. Note that the use of the descriptions "bank", "building society", "credit union" and "authorised deposit-taking institution" are strictly controlled by the *Banking Act*, as amended by the Wallis legislation. Under the Wallis legislation an entity cannot call itself a bank without the consent of APRA, an entity cannot call itself a credit union unless it is mutually owned by its members and any ADI can call itself a building society, under s 66. An entity may not describe itself as an ADI unless it is an ADI, according to s 66A. Further, an ADI can describe itself in any manner that is not misleading.

This section is concerned with regulation and supervision to which ADIs are subjected specifically because they are ADIs. However, it should be appreciated that a growing body of statutory regulation, including the *Corporations Law*, the *Trade Practices Act* 1974 (Cth) and the *Contracts Review Act* 1980 (NSW), extends generally to ADIs and affects their operations and administration. Non-ADIs may need to consider other industry legislation, such as the *Financial*

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65 For example banks were regulated as such under the *Banking Act* 1959 (Cth). Finance companies were required to submit statistical information to the RBA under the *Financial Corporations Act* 1974 (Cth) (FCA), but a major source of regulation of their activities lies in the prospectus requirements under the *Corporations Law*. Merchant banks were required to be registered under the FCA and are subject to regulation under the Corporations Law (eg requirements for holding securities dealers licences). Building societies were subject to the FCA (this required them to give financial statistics to the RBA, but otherwise the Commonwealth Government had no direct involvement in their regulation or supervision and they fell within the ambit of State and Territory legislators who implemented the Financial Institutions Scheme). Credit unions were regulated in a similar manner to building societies. All these institutions, to the extent that they are involved in banking business, will be supervised under the Wallis legislation's ADI regime. At the time of writing the non-bank financial institutions (such as building societies) were expected to be regulated under the ADI regime from late 1998 or early 1999.

66 *Banking Act* 1959 (Cth), s 5.

67 See section IV B of this article.

Corporations Act 1974 (Cth).[68]

An authority to conduct banking business may be granted subject to conditions which may, from time to time be varied, revoked or augmented.[69] Holders of an authority to conduct banking business under s 9(3) of the *Banking Act* granted from 1981 onwards have been subject to conditions requiring the authority holder in question to consult with the RBA on matters relating to prudential supervision and to conform with RBA arrangements for prudential supervision. Since 1 July 1998, APRA has taken on the prudential supervision function and authority holders must now liaise with APRA on these matters.

APRA has the power to revoke an ADI's authority on a number of bases. These include the failure to comply with the *Banking Act,* failure to comply with conditions in its authority, the national interest, the interests of depositors, failure to pay financial sector levies, insolvency and cessation of banking business. Further, an authority may be revoked where the holder of the authority requests revocation and APRA is satisfied that revocation would not prejudice either the depositors or the national interest.[70]

The relevance of the ADI regulatory regime for electronic payment scheme participants is as follows. If the participant's activities in the scheme (or its activities generally) amount to "banking business", then they must apply for an authorisation or exemption from APRA. To fail to do so would expose the participant to civil penalties.

ADIs are permitted to be the holder of the stored value of a purchased payment facility and do not otherwise require specific authority or exemption[71] from the RBA (see the discussion above of the authorities and exemptions required to be obtained by non-ADIs operating a purchased payment facility).

B. Banking Business

The terms "bank" and "business of banking", while appearing frequently in statutes, have historically eluded prescriptive definition. In part this is due to the historical development of banks and the changing nature of the services and products offered by banks.

However, the *FSR Act* amends the *Banking Act* by inserting a new definition of "banking business" in s 5 of the *Banking Act.*[72] "Banking business" is defined as:

(a) a business that consists of banking within the meaning of paragraph 51(xiii) of the Constitution; or

(b) a business that is carried on by a corporation to which paragraph 51(xx) of the Constitution applies and that consists, to any extent, of:

68 The *Financial Corporations Act* 1974 (Cth) gives the RBA a wide range of powers to regulate non-bank financial institutions. Most of this legislation has not been proclaimed. Only Part IV is operative and this part obliges financial institutions (especially lenders) to register with the RBA and provide the RBA with various statistical information. This relates to the amount and type of business undertaken by the institution.

69 *Ibid,* s 9(4).

70 *Ibid,* s 9A.

71 For a discussion of exemptions granted by APRA in respect of the *Banking Act* 1959 (Cth), see section VII F of this article.

72 Schedule 2, Item 10.

(i) both taking money on deposit (otherwise than as part-payment for identified goods or services) and making advances of money; or

(ii) other financial activities prescribed by the regulations for the purposes of this definition.[73]

Paragraph 51(xiii) of the Constitution gives the Commonwealth the power to make laws with respect to banks, and paragraph 51(xx) gives the Commonwealth the power to make laws with respect to trading and financial corporations. The above definition of banking business does little to illuminate the reader as to the nature of a bank and its business and, indeed, as will be seen below, many institutions which are not banks nevertheless carry on banking business within the meaning of s 5 of the *Banking Act*. The definition does more to establish the constitutional basis of the regulation imposed by the *Banking Act* than it does to describe the business of banking.

Section 5 of the *Banking Act* provides that:

> *bank* means an ADI that is permitted under section 66 to assume or use:
>
> (a) the word bank, banker or banking; or
>
> (b) any other word (whether or not in English) that is of like import to a word referred to in paragraph (a).

The above provisions merely provide a framework for equipping APRA with supervisory powers to determine matters relevant to financial policy, and operates to prohibit unauthorised entities from carrying on banking business.

Persons other than bodies corporate, and bodies corporate not in possession of an authority under Part II of the *Banking Act* are prohibited from carrying on banking business, though an exemption may be obtained from the operation of the *Banking Act*.[74]

C. Banking Business – The General Law

While paragraph (b) of the definition of banking business in s 5 of the *Banking Act* describes some of the activities that will constitute banking business for the purposes of the Act, under paragraph (a) of the definition the general law concept of banking business appears to prevail. Various cases have explored the question of what constitutes banking business at general law without definitively fixing its bounds. In the case of the *Commissioners of the State Savings Bank of Victoria v Permewan Wright & Co Ltd*[75] (the '*State Savings Bank Case*') the majority (consisting of Isaacs, Gavan Duffy, Powers and Rich JJ) held that the essential characteristics of the business of banking were the collection of money by receiving deposits (repayable as agreed upon) and utilisation of the money so collected by lending it again.[76] In providing guidance as to the application of the definition of banking business Isaacs J states:

> If that be the real and substantial business of a body of persons and not merely an

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73 *Banking Act* 1959 (Cth), s 5.

74 See section VII F of this article.

75 (1915) 19 CLR 457.

76 *Ibid* at 471.

> ancillary or incidental branch of another business they do carry on the business of banking. The methods by which the functions of a bank are effected – as by current account, deposit account at call, fixed deposit account, orders, cheques, secured loans, discounting bills, note issue, letters of credit, telegraphic transfer and any other modes that may be developed by the necessities of business are merely accidental and ancillary circumstances any of which may or may not exist in any particular case.[77]

Kitto, Taylor and Owen JJ referred to the judgment of the majority in the *State Savings Bank Case* with approval in *Australian Independent Distributors Ltd v Winter*[78] (*Winter's case*) when they held that the Adelaide Cooperative Society Limited had not carried on the business of banking as the power to lend money conferred upon the society was limited to the making of loans to its members.

Lending money on overdraft by a bank and borrowing money by a customer on overdraft from a bank, and the running of a cheque account or current accounts, have been held to constitute *banking business*.[79] Failure, however, to provide a cheque service did not prevent a bank from being deemed to be carrying on the business of banking in the *State Savings Bank Case*.[80] This conflicts with the English position, in particular Lord Denning's statements in the case of *United Dominions Trust Ltd v Kirkwood*[81] to the effect that no one can be a banker who does not collect cheques for customers, pay cheques drawn on themself, and conduct current accounts.

The High Court in *Winter's Case* specifically adopted Justice Isaacs' definition (in the *State Savings Bank Case*) of the essential characteristics of the business of banking. This definition did not include the uses of cheques or the keeping of current accounts and accordingly this must be taken to have settled the question for Australia. It is uncertain whether the recent financial sector reform legislation, by defining *banking business*, has merely restated the general law.

With the relaxation of financial regulation since the early 1980s, there has been a blurring of traditional boundaries between banks and non-bank financial institutions which conduct some banking business. Across the financial system generally there has been an 'unbundling' of the traditional products offered by financial institutions. Financial institutions were once 'full-service' providers, but that is no longer necessarily the case. Specialist suppliers of individual product lines have emerged (for example, cash management trusts and mortgage originators), offering products that were once the almost exclusive domain of the traditional financial intermediaries. It was this trend that was influential in determining the current form of financial system regulation in Australia.

D. Are Electronic Payments Banking Business?

There are a number of uncertainties regarding the application of the concept of

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77 *Ibid* at 471.

78 (1964) 112 CLR 443.

79 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

80 *Commissioners of the State Savings Bank of Victoria v Permewan Wright & Co Ltd* (1915) 19 CLR 457.

81 [1966] 2 QB 431. While the majority of the Court of Appeal identified certain absolute characteristics usually found in a banker's business, the case appears largely to have been decided on the grounds of the plaintiff's wide reputation as an institution which carried on banking business.

banking business to electronic payment systems. An electronic payment system will amount to the conducting of banking business if it involves the "taking of money on deposit" and the "making advances of money" within the meaning of the *Banking Act's* definition of banking business.

No answers of general application can be given to this issue. It must be considered in the context of a particular payment scheme, by examining its particular characteristics. The definition of banking business refers to a business that consists of "taking money on deposit ... and making advances of money." If the electronic payment scheme does not involve both of these elements, then it will not involve the conduct of banking business. This issue will be analysed using the example of a smart card scheme. Assume for the purposes of this example that the smart card scheme concerns the issue of disposable, low value, anonymous, non-accounted, single currency smart cards and that consumers are not offered a right to obtain refunds for unspent value stored on their card.

(i) Deposit

"Deposit" is not defined in the *Banking Act*. General definitions refer to a payment "committed to the charge of a person, for safe keeping"[82] or made to a person "who is to return to him, not the same money, but a like sum".[83] Neither meaning accurately describes the nature of the payment made to a scheme operator by the holder of an electronic payment instrument such as a smart card. Courts have generally held that the acceptance of deposits involves the creation of a relationship of debtor and creditor.

A payment made by the user of an electronic payment scheme is not intended to create the relation of debtor and creditor. It is not a loan to the system operator and is it not intended, in the normal course, that the amount of the payment will be repaid to the customer. Rather, the payment is made to purchase a service to be provided in the future, that is, the settlement of payments for purchases made using the scheme. While the customer may have a right to receive a refund of the unused value (if applicable), the original payment by the customer will not have been made with the primary expectation of simply receiving the payment back.

(ii) Advance

The references in the definition of banking business to "making advances of money" should be read as references to the making of advances by the person carrying on the business. In the example, the entity which operates the smart card scheme would itself have to be making advances before the definition of banking business could apply to it.

The question then is, does the scheme involve the operator making advances of money to any person? The main attribute of an advance that distinguishes it from other dealings is the concept of *indebtedness*. Generally this involves a flow of

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82 Oxford English Dictionary, Clarendon Press (2nd ed, 1989).
83 Jowitt's Dictionary of English Law, Sweet & Maxwell (2nd ed, 1977).

funds, from the creditor to debtor, in the expectation of later repayment.[84] Such a concept is not reflected in the nature of most smart card schemes.

E. Carrying out Banking Business Without an Authority

Persons who are not bodies corporate, or who are bodies corporate but do not possess an authority under Part II of the *Banking Act*, are prohibited from carrying on banking business.

The consequences of a corporation carrying on banking business where it was not authorised to do so was explored by the High Court in *Yango Pastoral Co Pty Ltd v First Chicago Australia Limited*.[85] There the Court considered whether a contract carried out in breach of the *Banking Act* was enforceable. Mason J explained the result as follows:

> The provisions of the [*Banking Act*] though indirectly providing some safeguard to depositors, are principally designed to ensure that the Government and its agencies are equipped with accurate and detailed information as to the financial position of the banks as important financial institutions in the community and with supervisory powers and powers to determine matters relevant to financial policy in the interests of regulating the Australian economy. The Act is not a statute whose primary object is to define and regulate the rights and liabilities of banker and customer *inter se*.[86]

The High Court concluded that the purpose of the *Banking Act* was adequately served by the imposition of penalties prescribed for a contravention of s 8[87]. Further, they concluded that the *Banking Act* does not prohibit or invalidate contracts and transactions entered into in the course of carrying on banking business in breach of the section.[88]

F. Exemptions

APRA has the power under s 11 to exempt a person from all or part of the *Banking Act*. Section 11 exemptions have been granted in respect of compliance with ss 7 and 8 of the *Banking Act* so as to permit financial institutions such as merchant banks and others to carry on business without infringing the *Banking Act*.[89] Exemptions under s 11 of the *Banking Act* have also been granted in respect of compliance with s 66, which restricts the use of the word "bank".[90]

Given that the *Banking Act* now covers all ADIs, rather than just banks, these exemptions may have less significance than they once did. Such exemptions are less likely to be granted to conventional financial institutions in the future as the

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84 *Handevel Pty Ltd v Commissioner of Stamps (Vic)* (1985) 157 CLR 177 and *Lord Suffield v Inland Revenue Commissioners* [1908] 1 KB 865.

85 (1978) 139 CLR 410.

86 *Ibid* at 422.

87 Under the *Banking Act* 1959 (Cth), the penalties for breaches of section 8 are increased to $100 000 for bodies corporate and $20 000 for other persons.

88 Note 86 *supra* at 428 per Mason J.

89 Under Banking (Exemption) Order No 58 dated 25 June 1976, companies registered under the *Financial Corporations Act* 1974 (Cth) have exemptions from compliance with ss 7 and 8.

90 Under Banking (Exemption) Order No 65 dated 18 February 1990, corporations registered under the *Financial Corporations Act* 1974 (Cth) and classified in category D as money market corporations are permitted, subject to certain conditions, to describe themselves as 'merchant banks'.

intention of the Wallis legislation is that the maximum number of financial institutions are regulated under the ADI regime. However, exemptions for institutions not conventionally covered by the notion of financial institution, such as some participants in payment systems, are likely to be granted.

A participant in an electronic payment scheme may need to acquire more than one exemption or authority in respect of the financial sector regulatory regime. For example, the entity may obtain an exemption from the ADI supervision regime under s 11 of the *Banking Act*. However, should the participant be the holder of the stored value of a purchased payment facility, they would need to acquire an exemption or authority under the *PS Act* (see section VI above).

G. Supervision of ADIs

Following the financial sector reforms, APRA has taken over from the RBA as the primary prudential authority in Australia. The *Australian Prudential Regulation Authority Act* 1998 (Cth) sets out the purpose of APRA.[91]

Section 11B of the *Banking Act* 1959 provides that the functions of APRA include:

(a) the collection and analysis of information in respect of prudential matters relating to ADIs;

(b) the encouragement and promotion of the carrying out of sound practices in relation to prudential matters by ADIs; and

(c) the evaluation of the effectiveness and carrying out of those practices.

APRA under is given extensive powers under Divisions 1A, 1BA and 2 of the *Banking Act*. The powers can be summarised as follows:

- power to make prudential standards;[92]
- power to issue directions;[93] and
- oversight of the protection of depositors (see I below).

APRA is required to exercise these powers and functions for the protection of depositors.

H. Depositor Protection

One of the aims of the Government in supervising financial institutions has been

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91 See s 5(1). APRA is established for the purpose of regulating bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards, and for developing the policy to be applied in performing that regulatory role. Section 5(2): In providing this regulation and developing this policy, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality.

92 *Banking Act* 1959 (Cth), s 11AF.

93 For example, the power to: require ADIs to provide information relating to their financial stability, assume management of an ADI that is or is likely to be unable to pay its debts or which suspends or is about to suspend payment, make prudential standards, direct ADIs to comply with prudential standards, order an audit, order the removal, restriction or appointment of an officer, remove an auditor, direct an ADI not to give financial accommodation to a person, direct an ADI not to accept a deposit, direct an ADI not to repay a deposit and direct an ADI not to pay a dividend.

the protection of depositors. This applies to all ADIs and as such will be likely to influence the operations of some of the major participants in electronic commerce.

ADIs must hold assets (in Australia) at least equal to their Australian dollar-denominated liabilities: s 13A(4) *Banking Act.* If an ADI is unable to pay its debts, its assets must be first used to repay depositors (in priority to all other debts): s 13A(3) *Banking Act.*[94] Although there are no guarantees or insurance, the impact of these provisions are that ADIs must keep assets in Australia to meet their obligations to their depositors.

At first appearance, s 13A seems to give the depositors of an ADI an effective first charge over all the assets of the ADI in Australia. These assets must, by virtue of s 13A(4), be at least equal in value to the amount of its deposits. However, the effect and extent of the protection afforded depositors by s 13A is not entirely clear for two reasons. First, there is some debate about the interaction between s 13A(3) of the *Banking Act* and s 556 of the *Corporations Law*. Section 556 of the *Corporations Law* deals with the priority of secured and unsecured creditors of a company. It is arguable that s 13A of the *Banking Act* does not give depositors priority over any secured creditors of the ADI.

Secondly, the interrelationship between s 13A of the *Banking Act* and s 553C of the Corporations Law is ambiguous. Section 553C of the Corporations Law contains provisions enabling debtors and creditors to set-off mutual obligations that exist between themselves.[95] It is uncertain whether the set-off would take precedence over the ADI's obligations under s 13A.

I. Regulation of Shareholdings

The *Financial Sector (Shareholdings) Act* 1998 (Cth) is another major piece of legislative control over the financial sector in Australia. The Act extends to all ADIs, general insurance companies, life insurance companies and the holding companies of such institutions. Its object is to ensure a dispersion of shareholdings in financial sector companies in order to minimise the risk of a financial sector company being operated to serve the interests of one or a few large shareholders.

The basic scheme of the *Financial Sector (Shareholdings) Act* 1998 (Cth) is simple. A person, together with his or her associates, may not have a stake greater than 15 per cent[96] in a financial sector company without obtaining the approval of the Treasurer. The Treasurer need only consent if he or she is positively satisfied that it is in the national interest to do so.[97] The concept of a person's stake is based on the control that a person has over the decision-making process of a company. The Act applies to all ADIs, whether they are incorporated in Australia or elsewhere.

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94 Formerly s 16 (pre-Wallis legislation). Foreign ADIs are covered by s 11F.

95 For a detailed discussion of this issue, see Mallesons Stephen Jaques, *Australian Financial Law*, BLEC (4th ed, 1998); in particular the chapter by Andrew Smith entitled "Regulation and Supervision of the Australian Financial System" (the fourth edition is in production at the time of writing this article).

96 *Financial Sector (Shareholdings) Act* 1998 (Cth), s 10.

97 *Ibid*, s 14.

VIII. CONCLUSION

This article has identified the development of electronic payment schemes. It has examined the application of Australian law to those schemes. Most laws in force pre-date the growth of electronic payments. However, recent reforms such as the Wallis legislation specifically consider and deal with electronic payments. In particular, the Wallis legislation recognises that payment schemes may be operated by both financial and non-financial institutions. The Wallis legislation was designed to promote the stability of the Australian financial system by taking a character neutral approach, in order to regulate all operators of payment systems in Australia.